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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER JANUARY, Plaintiff, vs. TD SERVICE COMPANY, Defendants	Case No.: SACV11-1133-AG (RNBx) DEFENDANT T.D. SERVICE COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED; MEMORANDUM OF POINTS AND AUTHORITIES [FRCP Rule 12(b)(6)] Filed concurrently with Request for Judicial Notice DATE: January 9, 2012 TIME: 10:00 a.m. COURTROOM: 10D

TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 9, 2012, at 10:00 a.m. in Courtroom 10D of the above-entitled court located at 411 W. Fourth Street, Santa Ana, California 92701, defendant T.D. Service Company will move this court for an order dismissing it from the Second Amended

Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

This motion is based upon this Notice, the supporting Memorandum of Points and Authorities set forth below, the Request for Judicial Notice, the contents of the Second Amended Complaint, and all additional documents in the court file including the prior complaints.

DATED: November 14, 2011

THE DREYFUSS FIRM
A Professional Law Corporation

By: LAWRENCE J. DREYFUSS
Attorneys for Defendant
T.D. Service Company

1040-2621

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

In the former amended complaint, plaintiff asserted four purported causes of action, all of which arose from plaintiff's contention that T.D. Service Company ("T.D.") is not the holder of the underlying Note and Deed of Trust. The court granted leave to amend these causes of action. Instead, without obtaining leave of court to do so, plaintiff has filed a Second Amended Complaint that seeks multiple totally different theories of recovery, none of which is laid out in clear cut causes of action or claims for relief. As can be seen from the foreclosure documents accompanying the Request for Judicial Notice, the moving party, T.D., is a foreclosure company hired to be substituted in as trustee to process the nonjudicial foreclosure. All of the allegations in the Second Amended Complaint concern alleged impropriety in the origination of the loan, and T.D. as substituted trustee had nothing to do with its origination.

T.D. claims no interest in the loan. For unexplained reasons, plaintiff dismissed the beneficiary, Bank of America, from the lawsuit when he filed his Amended Complaint, and only T.D. is currently named as a defendant. Plaintiff in his prayer seeks quiet title, rescission of the loan contract and disgorgement of payments, along with damages, but does not include as a defendant the beneficiary who would be affected by such rulings. Bank of America as beneficiary is a necessary party for this equitable relief and the case cannot reasonably proceed in its absence. As discussed below in more detail, T.D.'s sole obligations as trustee are set forth in the statutory framework contained within California Civil Code § 2924 et seq. As substituted trustee, T.D. is entitled as a matter of law to rely upon the information provided by the beneficiary (see Civil Code § 2924(b)). T.D. is a disinterested neutral party merely retained to process the foreclosure. Suing T.D. here is like suing the recorder's office for allowing the notices to be recorded or the newspaper for publishing the notice of trustee's sale. A foreclosure trustee's duties to the trustor are no greater and are carefully limited and defined by statute. Plaintiff's Second Amended Complaint fails to state any proper cause of action against T.D.

II.

THE DUTIES OF T.D. SERVICE COMPANY AS FORECLOSURE TRUSTEE WERE LIMITED TO THE STATUTORY FRAMEWORK AT CIVIL CODE § 2924 ET SEQ.

Plaintiff's various causes of action primarily concern the origination of the underlying Note and Deed of Trust. As can be seen from the recorded documents accompanying the Request for Judicial Notice, T.D. had nothing to do with the origination of the loan in 2006, and was not retained until 2009 to be substituted in as trustee for the sole purpose of processing the nonjudicial foreclosure.

The duties of a trustee are strictly limited by the statutory framework in Civil Code § 2924 et seq. The California Supreme Court in the case of I.E. Associates v. Safeco Title Insurance Company (1985) 39 Cal. 3d 281 expressly held that the duties of a trustee are fully set forth in the statutory framework contained within Civil Code § 2924 et seq. The court in I.E. Associates stated that "The rights and powers of trustees in nonjudicial foreclosure proceedings have long been regarded as strictly limited and defined by the contract of the parties and the statutes (multiple cites)." 39 Cal.3d at 287. It confirmed that the legislature "occupied the field" in defining the duties required of trustees (39 Cal.3d at 285) and held:

> "In short, there is no authority for the proposition that a trustee under a deed of trust owes any duties with respect to exercise of the power of sale beyond those specified in the deed

> and the statutes. There are, moreover, persuasive policy reasons which militate against a judicial expansion of those duties. Non-judicial foreclosure statutes – an alternative to judicial foreclosure reflect a carefully crafted balancing of interests of beneficiaries, trustors, and trustees." (39 Cal.3d 288.)

Such a finding has more recently been confirmed in subsequent decisions such as Banc of America Leasing & Capital LLC v. 3 Arch Trustee Services, Inc. (2009) 180 Cal.App.4th 1090, 1097 ("The rights and powers of trustees in nonjudicial foreclosure proceedings are strictly limited and defined by the contract of the parties and the statutes."; Residential Capital v. Cal-Western Reconveyance Corp. (2003) 108 Cal.App.4th 807, 827 ("The comprehensive statutory framework established to govern nonjudicial foreclosure sales is intended to be exhaustive. . . . No negligence cause of action need be recognized here. Otherwise, we would be engaging in judicial legislation by grafting a tort remedy onto a comprehensive statutory scheme in the absence of a compelling justification for doing so."; Kachlan v. Markowitz (2008) 168 Cal.App.4th 316, 334 ("The scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. No common law duties exist."). Since nonjudicial foreclosure is a state law proceeding, the court should defer to California foreclosure law in addressing it. Butner v. United States (1979) 444 U.S. 48, 55; 59 L.Ed.2d 136, 142; 99 S.Ct. 914, 920.

Moreover, a trustee owes no duty to second guess the figures and other information provided by the beneficiary seeking to foreclose. On the contrary, Civil Code § 2924 expressly provides at subsection b that "[i]n performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage." Likewise, subpart d provides that "[t]he mailing, publication, and delivery of notices as required by this section . . ." and "[p]erformance of the procedures set forth in this article . . ." are all privileged acts. So any allegations in the Second Amended Complaint that the information contained within the foreclosure notices are purportedly inaccurate reflect issues between plaintiff and the foreclosing beneficiary, and not T.D. as trustee since its reliance on those figures supplied by the beneficiary is protected by law. Yet by dismissing that beneficiary from this lawsuit plaintiff sacrificed any ability to assert those claims.

III.

THE CAUSE OF ACTION FOR FRAUD BY NON-DISCLOSURE AND ITS SUBPARTS FAIL TO STATE A CLAIM AGAINST T.D. SERVICE COMPANY.

It is well established that fraud and deceit must be pled with specificity. FRCP Rule 9(b); Witkin, California Procedure, "Particularity in Pleading" § 711, p. 126 and multiple citations therein. Where, as here, the fraud cause of action is asserted against a corporation, "[t]he requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Tarmann v. State Farm Mutual Auto Insurance Company (1991) 2 Cal.App.4th 152, 157. Plaintiff's Second Amended Complaint fails to include any such allegations against T.D. in the cause of action for fraud.

Most of the allegations in the Second Amended Complaint allege that the purported fraud occurred back when the loan was made to plaintiff, and he was purportedly deceived by an unidentified real estate agent, appraiser, underwriter and lender's agent. There are no allegations that T.D. engaged in any of these roles or was involved in the making of the loan. The Deed of Trust confirms that T.D. was not even the trustee at that time back in 2006. T.D. was not retained until years later in 2009 to process the nonjudicial foreclosure as substituted trustee. Since T.D. was in no way involved in the origination of the loan, and only was retained to process the foreclosure, it could not have engaged in any of the alleged misrepresentations or owed any obligation to disclose material facts years earlier when the loan was created. There are no allegations that plaintiff detrimentally relied on any representations made by T.D. when it was later retained and drafted the foreclosure notices. On the contrary, plaintiff contests the contents of these notices, and nowhere alleges that he relied upon their contents in any way. In the absence of detrimental reliance, no cause of action can be stated for fraud. 5 Witkin, California Procedure, 5th Ed. § 710, p. 125.

Plaintiff alleges fraudulent concealment in failure to disclose this information at origination, or the "true holder" at the time of the foreclosure. On the contrary, the Notice of Default specifies on its face that Bank of America was the beneficiary at the time of the foreclosure. Plaintiff knew this since he named Bank of America as a defendant, although for some unexplained reason he later chose to dismiss Bank of America from the lawsuit. Moreover, constructive fraud as well as a duty to disclose giving rise to a potential claim of fraudulent concealment only apply if there is a fiduciary relationship between the parties. 5 Witkin, California Procedure, 5th Ed., § 717, p. 133 and multiple cases cited therein. As was confirmed in the case of Hatch v. Collins (1990) 225 Cal.App.3d, 1104, 1111-12, a foreclosure trustee owes no such fiduciary duty to the trustor or other parties to the foreclosure sale:

"A trustee under a deed of trust has neither the powers nor the

> obligations of a strict trustee; rather, he serves as a kind of common agent for the trustor and the beneficiary. (citations.) His agency is a passive one, for the limited purpose of conducting a sale in the event of the trustor's default or reconveying the property upon satisfaction of the debt (citations) .... A trustee therefore, while an agent for both the beneficiary and the trustor, does not stand in a fiduciary relationship to either (citations)." (emphasis added.)

As such T.D. owed no fiduciary duty to make disclosures to plaintiff, and had nothing to do with the origination of the loan when those disclosures purportedly would have been made. For all these reasons, none of plaintiff's fraud claims state a cause of action against T.D. Its motion to dismiss the fraud cause of action should be granted.

IV.

THE CAUSE OF ACTION FOR CONVERSION FAILS TO STATE A CLAIM AGAINST T.D. SERVICE COMPANY.

The next cause of action of the Second Amended Complaint is purportedly for conversion. It does not specify what items of personal property were purportedly converted, or by whom. A cause of action for conversion can only be for the wrongful exercise of dominion over personal and not real property of another. See Witkin, Summary of California Law 10th Ed., § 699, p. 1023 and multiple cases cited therein. As discussed above, T.D. Service Company's sole role in this matter is as substituted foreclosure trustee exercising the power of sale contained within the deed of trust secured by plaintiff's real property. It was not the beneficiary collecting any payments, and has had no involvement whatsoever with any of plaintiff's personal property. As pleaded, the conversion cause of action fails to state a claim, and T.D.'s motion to dismiss this cause of action should be granted.

V.

THE CAUSE OF ACTION FOR EQUITABLE ESTOPPEL FAILS TO STATE A CLAIM AGAINST T.D. SERVICE COMPANY.

Plaintiff's next cause of action purports to be for equitable estoppel. It states that plaintiff has pleaded that defendant owed plaintiff a fiduciary duty but misled him when the loan was originated by failing to disclose the details of the loan. As discussed above, T.D. is merely the foreclosure trustee substituted in years after the loan was originated. In this capacity it does not owe plaintiff any fiduciary duty. Hatch v. Collins, supra. (1990) 225 Cal.App.3d 1104, 1111-12. It had nothing whatsoever to do with the origination of the loan, and therefore did not make any representations or solicitations that would give rise to a claim of equitable estoppel. It is not even clear what T.D. is purportedly estopped from doing. The allegations of this cause of action seem to be intended to concern the undisclosed parties identified earlier in the Second Amended Complaint as being involved in the origination of the loan, including the real estate agent, appraiser, underwriter and lender's agent. This may conceivably involve the beneficiary who has been dismissed from the case. But nothing in the equitable estoppel cause of action states a claim against T.D. as foreclosure trustee, and T.D.'s motion to dismiss this cause of action should be granted.

VI.

PLAINTIFF'S CAUSE OF ACTION FOR NEGLIGENCE/NEGLIGENCE PER SE FAILS TO STATE A CLAIM AGAINST T.D. SERVICE COMPANY.

Plaintiff's next cause of action purports to be for negligence/negligence per se. It indicates that defendant breached a duty of care owing to plaintiff under TILA, HOEPA, RESPA and Regulations X and Z. It also claims again that defendants breached their fiduciary duty to plaintiff. However, as discussed above, T.D. is merely the foreclosure trustee processing the pending foreclosure, and was not substituted in until years after the loan was originated. Since it was not the lender, or involved in any way in the origination of the loan, it is not subject to TILA, HOEPA, RESPA, or Regulations X or Z which are all statutes that address lending issues. All of T.D.'s duties as trustee are outlined within the statutory framework contained within Civil Code § 2924 et seq. Nowhere in plaintiff's negligence cause of action, or for that matter anywhere else in the Second Amended Complaint, does plaintiff specify any violations of the all-inclusive duties set forth in that statutory framework.

In addition, the various claims by plaintiff under TILA, HOEPA, RESPA and Regulation Z are all barred by applicable statutes of limitations. As plaintiff acknowledges in the Second Amended Complaint and as confirmed by the Deed of Trust which accompanies the Request for Judicial Notice, the loan closed in 2006. Any claims for liability under TILA, HOEPA and Regulation Z must be brought within one year of closing pursuant to 15 USC § 1640(e). An action brought under RESPA must likewise be brought within one year of the alleged violation pursuant to 12 USC § 2614. Accordingly, all of these claims, even if they were somehow properly asserted against T.D., are time barred. T.D.'s motion to dismiss this cause of action should be granted.

VII.

PLAINTIFF'S CAUSE OF ACTION FOR UNJUST ENRICHMENT FAILS TO STATE A CLAIM AGAINST T.D. SERVICE COMPANY.

Plaintiff's next cause of action is for unjust enrichment. Again it relates solely to charges incurred at the origination of the loan, including commissions and premiums paid to the real estate broker, commissions, bonuses and other charges paid to the originating lender, resale premiums paid to the investors, and servicing fees paid to the servicers. As foreclosure trustee, the fees payable to T.D. are expressly authorized by the formulas contained within Civil Code § 2924c, et seq., and will be paid by the foreclosing beneficiary. Since T.D. had nothing to do with the origination or servicing of the subject loan, it did not receive any of the commissions, premiums, bonuses or other fees and charges referred to in this cause of action. Once again, by excluding all parties other than the trustee, plaintiff has failed to assert these claims against any of the parties who might theoretically be responsible to address them. Since the unjust enrichment cause of action fails to state a claim against T.D., its motion to dismiss this cause of action should be sustained.

VIII.

THE CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING FAILS TO STATE A CLAIM AGAINST T.D.

The next cause of action of the Second Amended Complaint asserts a tort claim based upon an alleged breach of the implied covenant of good faith and fair dealing. The California Supreme Court in Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654 significantly restricted the tort of breach of the covenant of good faith and fair dealing to insurance contracts and other special relationships. There is no current California case which extends the tort action for breach of the covenant of good faith and fair dealing to an action brought by a borrower against a foreclosure trustee. Since the time that the Foley case was published, California courts have consistently restricted the availability of this tort even further, and it survives almost exclusively in the context of insurance. See Freeman & Mills, Inc. v. Belcher Oil Company (1995) 11 Cal.4th 85; Trustees of Capital Wholesale Electric Etc. Fund. v. Shearson Lehman Brothers, Inc. (1990) 221 Cal.App.3d 617, 624-5. At the very least, for such a cause of action to be stated, there must be a fiduciary duty owed by the defendant to the plaintiff. As was confirmed in the case of Hatch v. Collins (1990) 225 Cal.App.3d, 1104, 1111-12, a foreclosure trustee owes no such fiduciary duty to the trustor or other parties to the foreclosure sale.

Moreover, most of the allegations in this cause of action concern the origination and servicing of the loan – neither of which involved T.D. as foreclosure trustee. It further alleges violation of the Fair Credit Reporting Act in the course and conduct of offering and making the above-noted mortgage to plaintiff. T.D. as foreclosure trustee was not retained until years later to process the foreclosure and has nothing whatsoever to do with loan origination or credit reporting. This cause of action therefore does not state a claim against T.D., and its motion to dismiss it should be granted.

IX.

THE CAUSE OF ACTION FOR INFLICTION OF EMOTIONAL DISTRESS FAILS TO STATE A CLAIM AGAINST T.D. SERVICE COMPANY.

It is well established that no cause of action can be stated for infliction of emotional distress in the context of economic damages as are alleged here. (See: Butler-Rapp v. Lourdeaux (2005) 134 Cal.App.4th 1220, 1227; Branch v. Homefed Bank (1992) 6 Cal.App.4th 793, 801; Smith v. Superior Court (1992) 10 Cal.App.4th 1033, 1040).

Further, T.D. certainly cannot be found to have inflicted emotional distress on plaintiffs by proceeding with the foreclosure pursuant to the statutory framework in Civil Code § 2924 et seq. (See I.E. Associates v. Safeco Title Insurance Company (1985) 39 Cal.3d 281, 285-288; Bank of America Leasing & Capital LLC v. 3 Arch Trustee Services, Inc. (2009) 18 Cal.App.4th 1090, 1097; Residential Capital v. Cal-Western Reconveyance Corp. (2003) 108 Cal.App.4th 807, 827; Kachlan v. Markowitz (2008) 168 Cal.App.4th 316, 334), since these are privileged acts (Civil Code § 2924(d)).

Moreover, as explained by the court in Trerice v. Blue Cross of California (1989) 209 Cal.App.3d 878, 883:

> "In order to state a cause of action for intentional infliction of emotional distress, a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff is suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (citation). Conduct, to be 'outrageous' must be so extreme as to exceed all bounds of that usually tolerated in a civilized society." (emphasis added).

In BAJI 12.74, such "extreme and outrageous conduct" is defined as follows:

> "Extreme and outrageous conduct is conduct which goes beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community.
>
> Extreme and outrageous conduct is not mere insults, indignities,

> threats, annoyances, petty oppressions or other trivialities. All persons must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind.
>
> Extreme and outrageous conduct, however, is conduct which would cause an average member of the community to immediately react in outrage." (emphasis added).

Needless to say, the mere processing of a nonjudicial foreclosure based upon information provided by the foreclosing beneficiary upon which the trustee is permitted as a matter of law to rely (see Civil Code § 2924(b)) cannot be viewed as "atrocious and utterly intolerable" and "so extreme as to exceed all bounds of that usually tolerated in a civilized society." Plaintiff's cause of action for infliction of emotional distress as against defendant T.D. as substituted trustee is therefore without legal or factual basis, and it should be dismissed.

X.

THE BALANCE OF THE SECOND AMENDED COMPLAINT DOES NOT ASSERT CAUSES OF ACTION.

The balance of plaintiff's Second Amended Complaint after the purported cause of action for intentional infliction of emotional distress does not itself assert any causes of action. Rather, it consists of argument regarding the previously pleaded causes of action, claiming that fraud was sufficiently pled, even though it was not as shown above. It further discusses participatory and vicarious liability based upon conspiracy, concert of action, assisting and participating, and assisting or encouraging. All of these discussions deal with activities at the origination of the loan, and do not involve T.D. as subsequently retained foreclosure trustee. There is no cause of action for conspiracy of this type, and any such claim must be founded on the underlying tort itself. Thompson v. California Fair Plan Association (1990) 221 Cal.App.3d 760, 767. As discussed above, T.D.'s sole role as foreclosure trustee was to comply with the statutory framework at Civil Code § 2924 et seq. There are no allegations within the Second Amended Complaint indicating any breach of these duties. These additional comments regarding conspiracy therefore add nothing to the causes of action discussed above. The balance of the Second Amended Complaint discusses damages, focusing on alleged breaches of fiduciary duty and wrongdoing in the origination of the loan. T.D. owed no such fiduciary duty and had nothing to do with origination. Damages are irrelevant since there is no liability by T.D. to begin with. As such, all of plaintiff's causes of action asserted against T.D. as foreclosure trustee should be dismissed. Since this is already the Second Amended Complaint and it is apparent that plaintiff cannot state a proper cause of action against T.D., the entire motion should be granted with prejudice.

DATED: November 14, 2011

THE DREYFUSS FIRM, plc

By: LAWRENCE J. DREYFUSS
Attorneys for Defendant T.D. Service Company

1040-2621

PROOF OF SERVICE (By Mail)
(CCP Section 1013a(3))

I am over the age of 18, and I am not a party to the within action. I am employed by THE DREYFUSS FIRM. PLC, in the County of Orange, at 7700 Irvine Center Drive, Suite 710, Irvine, CA 92618.

On November 16, 2011, I served the attached: **Defendant T.D. Service Company's Notice of Motion and Motion to Dismiss Second Amended Complaint** on the interested parties in this action by placing true copies thereof in sealed envelopes, addressed as follows:

Christopher January
1417 South Ridgeley Drive
Los Angeles, CA 90019

[X] **(By Mail)** I placed said envelopes for collection and mailing, following ordinary business practices, at the business offices of THE DREYFUSS FIRM, PLC at the address set forth above, for deposit in the United States Postal Service. I am readily familiar with the practice of THE DREYFUSS FIRM, PLC for collection and processing of correspondence for mailing with the United States Postal Service, and said envelopes will be deposited with the United States Postal Service on said date in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] **(By Facsimile Transmission)** I served the above-described document on the interested parties in this action by sending a true copy thereof by facsimile transmission pursuant to California rules of Court, Rule 2009(i)2, from facsimile machine number (949) 450-0668. The facsimile machine I used complied with California Rules of Court, Rule 2003(3), and no error was reported by the machine. Pursuant to Rule 2009(i)4, I caused the machine to print a transmission record of the transmission

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare, under penalty of perjury under the laws of the State of California, that the above is true and correct.

Executed on November 16, 2011, at Irvine, California.

Roma Klein